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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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No. 76-238

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THE NATIONAL FARMERS' ORGANIZATION, INC.,  
*Petitioner,*

v.

UNITED STATES OF AMERICA and ASSOCIATED  
MILK PRODUCERS, INC., *Respondents.*

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**OPPOSITION OF ASSOCIATED MILK PRODUCERS,  
INC., TO PETITION FOR A WRIT OF CERTIO-  
RARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT**

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SIDNEY HARRIS  
FRED KLEIN  
ARENT, FOX, KINTNER, PLOTKIN  
& KAHN  
1815 H Street, N.W.  
Washington, D. C. 20006  
(202) 857-6000  
*Attorneys for Respondent,  
Associated Milk Producers, Inc.*

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The Associated Milk Producers, Inc. (hereafter "AMPI") hereby opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit filed by the National Farmers' Organization (hereafter "NFO") in this case.

### OPINIONS BELOW

The opinions are reproduced in the petition for a writ of certiorari. (Apps. A, B, C, 1a-67a)<sup>1</sup>

### JURISDICTION

The jurisdictional statute is cited in the petition, but there is a failure to meet any of the jurisdictional standards which are required by Supreme Court Rules 19, 23.

### QUESTIONS PRESENTED

1. Whether a private treble damage claimant should be allowed to intervene in a government antitrust suit brought against the same defendant and for the same or similar practices involved in the private suit where: (a) a consent decree is proposed in the Government's suit and the proposed intervenor admits that the negotiation and acceptance of it was not subject to bad faith or malfeasance on the part of the government trial staff; (b) no prior court mandate has been ignored or subverted by the Government; and, (c) all of the relief requested in the complaint has been obtained without the necessity of a trial.

2. Whether the District Court's factual determination that the private treble damage claimant failed to show any taint on the negotiation and acceptance of the proposed consent decree and that any evidence it sought to offer would be irrelevant and/or cumulative was clearly erroneous and whether in view of such

<sup>1</sup> Citations to the appendices to the petition identify the specific appendices by the abbreviation "App." and the appropriate letter designations, and state the appendix page numbers. References designated as "R" are to the Appendix filed in the Court of Appeals.

determination it was a clear abuse of discretion for the District Court to refuse to order an evidentiary hearing.

### STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are cited and reproduced in the petition. (Apps. D, E, 68a-73a)

### COUNTERSTATEMENT OF THE CASE

As set forth in the petition for writ of certiorari this case involves petitioner's unsuccessful attempt to intervene in a civil antitrust suit brought by the United States against AMPI. Petitioner's declared purpose for intervention is to oppose entry of a consent decree as the final judgment in the case. Petitioner has presented an extremely inaccurate recitation of the facts. Many material facts have been ignored and misstated and the relevant opinions below have been distorted.<sup>2</sup> It is therefore necessary to provide the court with a more complete and accurate statement of the facts. The respondent AMPI supplements and corrects petitioner's Statement of the Case as follows:

#### 1. Nature of the Case

The petitioner seeks review of an order of the Western District of Missouri denying its motion to intervene in an antitrust action brought by the United States against AMPI. (App. C) The United States instituted this civil antitrust action on February 1, 1972, in the Western District of Texas. In mid-1972, discovery was coordinated with the Midwest Milk Monopolization Litigation, JPML Docket No. 83 pend-

<sup>2</sup> Supreme Court Rule 23 provides that inaccuracy is itself sufficient reason to deny the petition.

ing in the United States District Court for the Western District of Missouri, and for all practical purposes proceedings in the case were directed by that Court from that time on. Subsequently, in February 1974, the suit was formally transferred to the Western District of Missouri.

Respondent AMPI is an agricultural cooperative marketing association,<sup>3</sup> organized and existing under the laws of Kansas. The members of AMPI are individual dairy farmers. Petitioner NFO is an agricultural organization incorporated under Iowa laws which has filed and is presently prosecuting a private antitrust action against AMPI alleging injury as a competitor. AMPI has counterclaimed against NFO. Both of these claims, along with others,<sup>4</sup> are included in JPML Docket No. 83.

On April 30, 1975, the district court entered a final consent judgment in the government suit against AMPI. On April 16, 1976 the United States Court of Appeals for the Eighth Circuit unanimously affirmed the district court. (App. A) Subsequently, on May 19, 1976, the Eighth Circuit denied NFO's petition for rehearing. (App. B)

## 2. The Course of the Negotiations

After the United States filed this civil antitrust action against AMPI on February 1, 1972, there were some early negotiations between the two parties regarding possible settlement of the case by consent.

<sup>3</sup> An agricultural cooperative marketing association is defined in the Capper-Volstead Act, 7 U.S.C. § 291 (1970).

<sup>4</sup> *Alexander v. NFO*, Civil Action No. 19191-1, Western District of Missouri.

These negotiations failed to result in an agreement, and discussions terminated in March or April, 1973. In January, 1974, with different counsel representing AMPI, the parties began serious settlement negotiations which were different in character from the earlier talks. (R. 698) It was these later discussions that resulted in the proposed consent decree, which was filed with the district court on August 13, 1974.<sup>5</sup> (R. 698, 198)

The earlier contacts which are exclusively relied upon by petitioner to support its claim for intervention occurred entirely prior to 1974 and in time substantially prior to the initiation of negotiations which led to the consent decree. These contacts were found by the district court not to be relevant to the then pending consent decree proposal. Although petitioner relies extensively on the Final Report of the Select Committee on Presidential Campaign Activities of the United States Senate it fails to quote the crucial find-

<sup>5</sup> A review of the petition discloses that petitioner has not, nor is it able to, point to any contacts between representatives of AMPI and government officials with respect to the consent decree negotiations, subsequent to January, 1974, which even remotely can be labelled a "suggestive contact." (Pet. 8-15) Moreover, the Government has admitted on the record that (1) a thorough investigation failed to establish any evidence that anyone in the Antitrust Division acted improperly with respect to AMPI both before and after the case was filed; (2) the Antitrust Division trial staff and their superiors unanimously approved the consent decree; (3) the decree was negotiated solely by Antitrust Division personnel and AMPI counsel; and (4) except for comments of third parties received by the district court and technical advice from the Department of Agriculture "no person outside the Antitrust Division was consulted by the Antitrust Division about terms to be included or omitted from the proposed consent decree." (R. 471)

ing in the Report which refutes its argument: "[T]here is no evidence that Kalmbach or any White House official intervened in the antitrust suit thereafter [referring to April, 1972]." (R. Ex. B. 729)<sup>6</sup> Additionally, while all of the references to the contracts relied on by petitioner have been fully aired and inquired into, and were available to the courts below, there has never been any suggestion of any improper influences upon the consent decree proposed on August 13, 1974. In fact, petitioner has itself stated on the record that it does not in any way contend that Government counsel conducted themselves improperly in the negotiation of the decree or in the presentation of the proposed decree to the district court. (R. 374, 479-480)

### 3. Proceedings Regarding the Proposed Decree

Shortly after August 13, 1974, when the United States and AMPI filed the consent decree with the district court, a pretrial proceeding was held in the Midwest Milk cases at which time a schedule was prepared for the orderly submission of third party comments, suggestions, and objections to the proposed decree, designed to aid the court in determining whether the consent decree would serve the public interest. (R. 200-202) Under this schedule, third parties were invited to identify their objections or requests for explanation regarding either specific parts

<sup>6</sup> The Senate Report, after reviewing the entirety of the evidence on political contributions and the antitrust suit filed by the Government, was unable to conclude that there was anything improper in the manner by which the Justice Department handled the case. In fact, there are numerous references to facts which demonstrate a lack of outside influence on the suit and a "vigorous prosecution" on the part of the Government. (R. Ex. B. 729 n.57, 732-733, 733 n.83).

or the entirety of the proposed decree. After these initial comments, the Government and AMPI were to consider and respond to the questions and comments received. During the second "phase" of the schedule, any third party who desired to comment was invited to file a written response, including but not limited to motions to intervene pursuant to Rule 24, Fed. R. Civ. P., or statements of *amicus curiae* appearance. Following written response by the Government and AMPI, another court hearing was planned at which further argument regarding the third parties' positions would be heard, and any necessary future proceedings would be scheduled.

Under this procedure, a large number of extensive comments and suggestions were filed by third parties, including third parties who are not parties to any suit pending in JPML Docket 83. (*See, e.g.*, R. 241, 243) The United States then filed a 98-page response, explaining in detail the objectives achieved by each provision of the proposed decree and the reasons for the selection of the particular mode of relief, as well as an appendix which demonstrated that the proposed decree enjoined the specific acts alleged in its complaint. (R. 250-351) Copies of all documents were mailed to all parties to the private litigation and to all others whom the government thought might be interested. The government also made available to the district court and to any other persons requesting it the massive economic study on which it based its economic analysis. (R. Ex. A). The district court received further comments, bringing the number of those filing comments to eight parties to the private litigation and seven other parties. (R. 203-245, 247-249, 410-462, 615-626, 646-654)

It is clear that, from the beginning, petitioner objected to the entry of not just this particular proposed decree but *any* consent decree. In its "phase I" comment on the proposed decree petitioner asked, "[w]hy should *any* consent decree between AMPI and the Government be approved . . ." and called for a "full public trial" which would result in a litigated judgment having *prima facie* effect. (R. 213)<sup>7</sup> (emphasis added) In "phase II" of the scheduled procedures, petitioner filed its motion to intervene and detailed its objections to the decree. (R. 364-365, 391-409) After the Government and AMPI filed a response in opposition (*see, e.g.*, R. 464) a hearing was held at which time third parties were given the opportunity to exhaustively argue their positions to the district court. (R. 477-600)<sup>8</sup> The court deferred

<sup>7</sup> In a pretrial proceeding held in the Midwest Milk Monopolization Litigation, NFO counsel stated his interest in conserving his client's money by the Government carrying its case to a litigated conclusion. (Tr. of Proceedings, JPML Docket 83, July 31, 1974, at 192). This is not an appropriate justification for granting intervention. *See, e.g.*, Securities and Exchange Comm'n v. Everest Mgt. Corp., 475 F.2d 1236, 1239 (2d Cir. 1972).

<sup>8</sup> At this hearing, in response to a specific request from the court, the only evidence which petitioner offered to produce at an evidentiary hearing was the witnesses whose testimony was reflected in the Senate Watergate Report, which would be cumulative to the Report itself, and the testimony and files of Richard M. Nixon and his presidential tapes, which the court found would be wholly irrelevant to the consent decree proposed and negotiated in January, 1974 and which would possibly be subject to a claim of executive privilege. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Sun Oil Co. v. United States, 514 F.2d 1020 (Ct. Cl. 1975); Nixon v. Administrator of General Services, 408 F. Supp. 321 (D.D.C. 1976). (R. 481-493) Moreover, although invited to, petitioner made no effort to question counsel for the Government on the record concerning the terms of the consent decree. (R. 556-600)

ruling on petitioner's motion, along with several other motions for intervention, pending consideration of the advisability of holding an evidentiary hearing on the consent decree. (R. 495)

In the interim, on December 21, 1974, the Antitrust Procedures and Penalties Act<sup>9</sup> (hereafter "APPA") was enacted into law. Although the procedures already ordered by the district court adequately complied with the new Act's requirements for publication of the decree and a competitive impact statement, and the response to third-party comments by the parties (sections 2(b)-2(d)), the district court asked AMPI to file a 2(g) statement of contracts.<sup>10</sup> On February 21, 1975, AMPI voluntarily filed a statement covering the period during which the proposed decree was negotiated.<sup>11</sup> (R. 673) On March 28, 1975, acting pursuant to court request, the United States submitted a brief additional list of AMPI contacts with the Antitrust Division between the filing date of the suit and the start of the settlement negotiations. (R. 686) On April 9, 1975, AMPI filed a list of governmental contacts for the same period. (R. 698)

On April 30, 1975, the district court entered the consent decree. (App. C. 47a) In an accompanying Memorandum and Order, in which the court articulated

<sup>9</sup> Pub. L. 93-528, 88 Stat. 1706, 15 U.S.C.A. § 16(b)-(g) (Supp. I, 1975).

<sup>10</sup> AMPI at that time denied that the new Act was applicable to a consent decree proposed prior to the enactment of the new law (R. 659-671) and continues to so argue.

<sup>11</sup> AMPI argued to the district court and continues to maintain here that Section 2(g) applies only to the proposed consent decree filed by the parties.

the meticulous scrutiny to which the decree was subjected, the proposed consent judgment was approved as being in the public interest. (App. C. 13a) Since the court found that the Government's attorneys had been uninfluenced by outside political pressure and had proposed and negotiated the decree in good faith and without malfeasance (App. C. 30a) petitioner's motion for intervention was denied. This was unanimously affirmed by the United States Court of Appeals for the Eighth Circuit. (App. A)

#### 4. The Opinions of the Lower Courts

##### A. THE DISTRICT COURT

Petitioner contends that the writ should be granted due to a confusion in the law. (Pet. 28-32) Yet the only confusion evidenced by the petition results from its mischaracterization of the opinions of the courts below; not from court decisions on the same question.

Initially, petitioner states that the first two elements of Rule 24(a)(2), F.R.Civ.P.—interest and practical impairment or impediment—are not at issue in this case. (Pet. 6) The district court reached the contrary conclusion, however, holding that petitioner had failed to meet either of these two tests. As a member of the public and as a private treble damage claimant, petitioner lacks the appropriate interest to enable it to intervene as a matter of right. (App. C. 36a) Furthermore, since petitioner argued only that more stringent relief should have been included in the consent decree and is not “foreclosed from urging that view in the private litigation,” its alleged interest has not been impaired or impeded. (App. C. 40a) It is, therefore, indisputable that the district court found

petitioner to have failed to meet this burden under Rule 24.<sup>12</sup>

Contrary to petitioner's characterization (Pet. 20-25), the district court's opinion clearly and precisely explained why inadequate representation had not been shown.<sup>13</sup> Petitioner's argument on this point was based on its claim that “the Government in its entirety and in those reaches of the Government inaccessible to counsel who represent it here have . . . made a deal.” (App. C, 23a) Petitioner declined, however, to question the government attorneys as to the relief contained in the consent decree, and when asked what additional information it possessed to support its claims it offered only information already available for the court's inspection and/or which was irrelevant since it related to a period of time at least a year prior to the commencement of negotiations for the proposed consent decree. (App. C, 19a, 23a-26a) On the basis of this information and utilizing the standards set

<sup>12</sup> The court of appeals clearly recognized the district court's holding that, except for timeliness, petitioner failed to satisfy any of the requirements of Rule 24(a)(2). (App. A, 6a)

<sup>13</sup> Petitioner's contention that the burden is on the existing party to prove adequate representation by the government is in direct contrast to the opinions of this Court. *See* *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). *Cf.* *New Jersey v. New York*, 345 U.S. 369 (1953). The lower courts are in virtual agreement that the burden of establishing inadequate representation remains on the proposed intervenor. *See, e.g.,* *Blanchard v. Johnson*, 532 F.2d 1074, 1077 (6th Cir. 1976); *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976); *Rios v. Enterprise Ass'n Steamfitters Local*, 520 F.2d 352, 355 (2d Cir. 1975); *Reedsburg Bank v. Apollo*, 508 F.2d 995, 997-998 (7th Cir. 1975); *Edmondson v. State of Nebraska ex rel. Meyer*, 383 F.2d 123, 127 (8th Cir. 1967).

forth in *Sam Fox Publishing Co., Inc. v. United States*, 366 U.S. 683 (1961), the district court found as a matter of fact that due to petitioner's failure or inability to "indicate with any degree of particularity" whether it had any "claim" or evidence that members of the Antitrust Division were improperly influenced by AMPI, it would not accept the argument that "where there is smoke, there must be fire." The court added that

[w]e are confident that so far as the personnel of the Antitrust Division of the Department of Justice involved in the actual negotiation of the pending proposed consent decree are concerned, all such persons were uninfluenced by outside political pressure and that the proposed consent decree was in fact negotiated in good faith and without malfeasance on the part of the representatives of the United States who in fact negotiated and proposed the consent decree. We so find. (App. C, 30a)<sup>14</sup>

Petitioner was therefore adequately informed by the court of the basis and reasons for the denial of its motion to intervene.

The APPA was enacted into law subsequent to the time the consent decree was filed with the court and the implementation of scheduled procedures to aid the court to determine whether it should be entered as the final judgment in the case. AMPI consistently argued that this new statute could not be applied retroactively

<sup>14</sup> Commenting on the material upon which petitioner relied to support its right to intervene, the court noted that "[t]hat data, in our judgment, does not support NFO's suggestion that corruption was at work in the formulation of the consent decree proposed in this case." (App. C, 26a)

to a consent decree which had previously been proposed.<sup>15</sup> Without determining the applicability of the Act, the district court found that the extensive procedures implemented in this case substantially and adequately complied with the new requirements. (App. C, 14a, 18a, 21a, 22a n.6, 30a)

Petitioner does not contend that Sections 2(b), (c), (d) and (f) of the APPA have not been complied with. Indeed, based upon the requirements imposed by the district court for publishing the decree and permitting third parties to comment thereon, it is clear that these sections were anticipated and complied with even before the passage of the Act. The district court so held. (App. C, 18a, 19a-20a n.5)

Contrary to petitioner's argument (Pet. 23-24), the district court applied the correct legal principles under Section 2(e) of the APPA which codified existing law and practice requiring that the district court must

<sup>15</sup> This is clear from the wording of the statute itself. A defendant's contacts must be filed under Section 2(g) "[n]ot later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) . . . ." Unless the consent judgment proposed was submitted under 2(b) of the Act, the requirement of filing a statement of communications, which is the principal error in applying the APPA of which petitioner complains, does not apply. The Act became law in December, 1974, long after the consent judgment had been filed with the district court. Therefore, the proposed consent decree which was filed on August 13, 1974 could not have been filed under 2(b) because the Act was not yet law. Furthermore, an amendment to this bill in Congress, which would have specifically provided retroactive effect for the Act, was never enacted. See H.R. 9947, 93d Cong., 1st Sess. (1973). This clearly demonstrates the inapplicability of the APPA to the consent decree proposed in this case.

make an independent determination that the consent decree is in the public interest. The court was well aware of its obligation to determine that the consent decree was in the public interest. (R. 536) Rather than acting as a "rubber stamp" the court indicated its dissatisfaction with the manner in which the proposed consent decree had been presented and required "procedures consistent with full illumination in an orderly manner," with specific references to provisions of the APPA. (App. C, 16a)<sup>16</sup> Instead of accepting the first consent decree proposed by the parties the court specifically noted its disapproval of various portions and advised modification of these provisions which was complied with. (App. C, 31a) Finally, the court explicitly and independently found the entry of the proposed consent decree to be in the public interest, while recognizing the existing discretionary power of the Attorney General to enter into such agreements. (App. C, 38a-41a)

That Section 2(e) of the Act merely codified existing law with respect to approving consent decrees is evident from the legislative history of that Act. Congressman Seiberling stated that:

*Under the existing law, courts, before approving a consent decree, are supposed to consider whether the decree is in the public interest, and not merely to "rubberstamp" an agreement that has been arrived at between the Department of Justice and*

<sup>16</sup> The court never expressed its concern that the decree might be a "last dividend," as petitioner would have this Court believe. (Pet. 21-22) Rather, the court insisted upon procedures to ferret out whether such a charge could justifiably be made, and after all information had been analyzed concluded it could not. (App. C, 16a)

the particular defendants. 119 Cong. Rec. H10762 (daily ed., 11/19/74).<sup>17</sup> (emphasis added)

District court judges have traditionally sought to avoid the label of being a "rubber stamp" for the Department of Justice in consent decree proceedings. *United States v. CIBA Corp.*, 50 F.R.D. 507, 514 (S.D. N.Y. 1970). Furthermore, courts have correctly recognized their nonpassive role in approving consent decrees.<sup>18</sup> The district court in this case was therefore correct in stating that Section 2(e) is "an accurate codification of existing case law." (App. C, 39a) Therefore, in finding and concluding that "it would not be in the public interest to reject the proposed consent decree," the district court properly complied with Section 2(e) of the APPA. (App. C, 41a)

Section 2(g) of the APPA requires that the defendant file a statement of its contacts with the government concerning or relevant to the specific proposed consent decree filed by the parties. The words "such proposal" in that section clearly refer back to Section 2(b)'s language regarding the "proposal for consent judgment . . . [which] shall be filed." Of course, the proposal referred to is the proposed consent judgment

<sup>17</sup> This view was also expressed in hearings on the bill by Judge Skelly Wright and former Assistant Attorney General Donald Turner. See Hearings Before Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., 1st Sess., (1973), at 147-148, 192.

<sup>18</sup> See generally *Pope v. United States*, 323 U.S. 1, 12 (1944); *Esco Corp. v. United States*, 340 F.2d 1000, 1005 (9th Cir. 1965); *United States v. International Telephone and Telegraph Corp.*, 349 F.Supp. 22, 25-26 n.2 (D.Conn. 1972), *aff'd per curiam sub nom.*, *Nader v. United States*, 410 U.S. 919 (1973); *United States v. Ling-Temco-Vought, Inc.*, 315 F.Supp. 1301, 1308, 1309 (W.D. Pa. 1970); *United States v. F. & M. Schaefer Brewing Co.*, 1968 Trade Cases ¶ 72,345 (E.D. N.Y. 1967).

which was filed with the district court. No discussion or contacts took place between personnel of the Anti-trust Division who negotiated the decree and anyone purporting to act on behalf of AMPI relating to the consent decree which are not listed in the description of contacts filed by AMPI. The district court, therefore, appropriately rejected petitioner's argument that Section 2(g) covered "all political activities and all lobbying contracts." (App. C. 30a)<sup>19</sup> (emphasis in original)

Finally, the court refused to grant an evidentiary hearing because the material petitioner sought to adduce at such a hearing was "either uncontroverted or clearly irrelevant and immaterial to any issue before the Court" and it failed to "indicate with any degree of particularity" the claim made. (App. C. 19a, 30a)

#### B. THE COURT OF APPEALS

The decision of the court of appeals unanimously affirmed the district court on the denial of intervention. It held that since the Attorney General must retain discretion to control the government's litigation, the intervention standard of showing "[B]ad faith or malfeasance on the part of the Government" in nego-

<sup>19</sup> Since the only contacts petitioner claims to have been omitted by AMPI were already on the public record, the statement of contacts fully complied with the purposes behind the requirements in the new statute and the district court did not abuse its discretion in denying intervention and approving the consent decree. See *Seenie Hudson Preservation Conf. v. F.P.C.*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972). See also *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (9th Cir. 1973). Contrary to petitioner's allegation (Pet. 21) the court did not reject AMPI's 2(g) filing as a model for the future but rather did not make a determination on that issue. (App. C. 29a)

tiating and accepting a consent decree . . . ." should be retained. (App. A. 9a)<sup>20</sup> Recognizing that petitioner did not question the good faith of the trial staff who negotiated and accepted the decree, that the malfeasance of which NFO complained related solely to the commencement of the case, and that petitioner was given an opportunity to submit extensive information and question the Government attorneys about the decree, the court held that the district court's decision that the Government attorneys acted in good faith and adequately protected the public interest by the decree was correct. (App. A. 9a-10a)<sup>21</sup>

#### REASONS FOR DENYING THE WRIT

Respondent submits that the petition presents no special or important reason which would make it proper to grant a writ of certiorari. There is no conflict among the circuit courts of appeals or district courts with respect to the issues herein and no statute or case law has been construed in contravention of this Court's decrees. The result reached below does not turn on any unsettled federal questions. Rather, the courts below invoked well-settled judicial and statutory principles and correctly applied them to the particular factual situation presented in this case. The

<sup>20</sup> The court of appeals correctly followed the many cases which have interpreted *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) as being *sui generis* and inapplicable to this case. (App. A. 9a n.4)

<sup>21</sup> Contrary to petitioner's Statement of the Case, the court of appeals made reference both to the APPA and an evidentiary hearing. (App. A. 3a n.1, 11a) The court of appeals denied a petition for rehearing. On its own motion, the court amended its opinion to state that petitioner did not question the good faith of those government attorneys who negotiated the decree but only "unnamed high government officials." (App. B. 12a)

decisions of the courts below are wholly consistent with the law and the appropriate exercise of judicial discretion. Finally, the question of whether factual findings are supported by the evidence does not present a proper question for the granting of the Writ.

**I. The Petition Presents No Important Question of Federal Law, or Conflict Among the Circuits or Conflict with the Decisions of This Court**

The primary reason submitted by petitioner for granting the writ is the "resulting confusion" in the law due to a lack of Supreme Court precedents to serve as guidelines. (Pet. 28-32) Petitioner raises the specter of a multitude of irrational lower court decisions and the lack of guidance from this Court. To the contrary, however, the decisions of the Supreme Court and the lower court interpretations thereof are surprisingly clear and consistent in an area which is so fraught with factual distinctions. Virtually every court which has considered the question of a private treble damage litigant's right to intervene in a government antitrust proceeding has refused to allow such intervention. This is undoubtedly in recognition of this Court's well-settled rule that in federal antitrust litigation it is the United States "which must alone speak for the public interest." *Buckeye Coal & Railway Co. v. Hocking Valley Railway Co.*, 269 U.S. 42, 49 (1925).

If a party wishes to protect its own narrow private interests it can appropriately do so in a private treble damage action and remain unfettered by the Government's separate litigation. This Court has consistently recognized that

[i]t is the Attorney General and the United States district attorneys who are primarily charged by

Congress with the duty of protecting the public interest under these [antitrust] laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954).

Allowing any private party to intervene in a government antitrust proceeding merely by showing a disagreement with the terms of the consent decree based on its own individual concerns would not serve the overall public interest for it would encourage the injection of multiple competitive interests in each consent decree proceeding and would hamper the coordination of government antitrust policy. Avoidance of such chaos and the desire for a consistent government antitrust policy necessitate a standard of inadequate representation different in kind from that used in wholly private litigation.<sup>22</sup>

<sup>22</sup> Since the amendment of Rule 24, F.R. Civ. P., in 1966, courts have tended to allow intervention in wholly private controversies in situations where the proposed intervenor could demonstrate inadequate representation through a non-identity or antagonism of interests. 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1909 (1972). In antitrust actions brought by the Government, however, courts have denied intervention to those desiring to assert a private interest, particularly if they were capable of bringing, or had already brought, private treble damage actions. *See e.g.*, *United States v. Automobile Mfrs' Ass'n, Inc.*, 307 F.Supp. 617, 619 (C.D. Cal. 1969), *aff'd per curiam sub nom.*, *City of New York v. United States*, 397 U.S. 248 (1970); *United States v. Blue Chip Stamp Co.*, 272 F.Supp. 432, 440 (C.D. Cal. 1967), *aff'd per curiam sub nom.*, *Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968).

The Supreme Court has met this need by establishing a general rule that courts will not second guess the government's public interest judgment in settling a case by enabling a private party to intervene to assert an interest antagonistic to the defendant. In *Sam Fox Publishing Co., Inc. v. United States*, 366 U.S. 683 (1961) the Court affirmed the district court's denial of intervention in a consent judgment proceeding to private parties who alleged that various provisions of the decree were not in the public interest.<sup>23</sup> The Court clearly stated that:

[a]part from anything else, sound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting. 366 U.S. at 689.

In this manner the Court recognized that Congress has vested in the Government the duty to protect the public interest and that a disagreement with the wisdom of the United States' decision to settle one of its suits does not indicate inadequate representation of the public interest. As the Court has previously stated in a case concerning judicial review of the Attorney General's discretion with respect to consent decrees, "[h]is authority to make determinations includes the power to make erroneous decisions as well as correct ones." *Swift and Co. v. United States*, 276 U.S. 311,

<sup>23</sup> The Court, interpreting the pre-1966 version of Rule 24(a) (3), also held that the petitioner had failed to make the requisite showing that it would be bound by the result of the suit were intervention not allowed.

331-332 (1928). Therefore, only an egregious failure on the part of the government to fulfill its role as protector of the public interest in antitrust matters, with bad faith or malfeasance constituting evidence of this failure, will enable some other person, capable of representing the public interest, to fill the void.<sup>24</sup>

*Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), contrary to petitioner's contention (Pet. 29-30), did serve to clarify the standard for intervention by private parties in government antitrust consent decree proceedings. It firmly established that *Sam Fox* required outrageous conduct on the part of the government in accepting a consent decree of such a nature that it could be assumed the government was acting without authority and failing to perform its duty.<sup>25</sup>

<sup>24</sup> In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the only case in which the Supreme Court has approved intervention in these circumstances, the State of California was placed in the role of protecting the public interest.

<sup>25</sup> These decisions reflect the Court's recognition that a private party should obtain no greater rights to influence the conduct of the government's case through intervention than it would through relief in the nature of mandamus. Under the latter approach, a party can compel a government official to perform a discretionary act but has no control over how such discretion is to be exercised. *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218-219 (1930). Likewise if, in an antitrust case, the government acts in such a manner that it is failing to perform its discretionary duty, *Sam Fox* and *Cascade* would permit intervention. Where the only showing, however, is a disagreement with how the government has exercised its discretion, as in this case, intervention should be denied.

*Cascade* involved exceptional facts<sup>26</sup> which demonstrated an abdication by the government of its role of negotiating consent decrees in the public interest through its disobedience to a court order. In that case the Government sought to enjoin the acquisition by El Paso Natural Gas of Pacific Northwest Pipeline as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18 (1970). After lengthy litigation resulting in a full trial on the merits the Supreme Court found an antitrust violation and ordered "divestiture without delay." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). The Department of Justice and defendant agreed on the provisions of the divestiture decree which was then approved by the district court.<sup>27</sup> On appeal the Supreme Court held that intervention of right by the State of California and others should have been granted in the proceedings on remand from its prior order because the government had "knuckled under" to El Paso and had failed for three years to carry out the Court's mandate for "divestiture without delay." 386 U.S. at 136, 141.

The holding of *Cascade* was clearly limited to the distinct factual circumstances presented by that case.

<sup>26</sup> Even petitioner has admitted this by its reference to *Cascade* as representing "the exceptional case doctrine." (R. 474, 492) This is further illustrated by the fact that *Cascade* is the only case where the Supreme Court required intervention in a government antitrust case involving a consent decree by a person capable of protecting the integrity of its mandate. The lower courts have also recognized this factor of *Cascade*. See App. A. 9a n.4. See also *United States v. Automobile Mfrs' Ass'n, Inc.*, 307 F.Supp. 617, 619 n.3 (C.D. Cal. 1969), *aff'd per curiam sub nom.*, *City of New York v. United States*, 397 U.S. 248 (1970).

<sup>27</sup> The decree provided for gradual divestiture and failed to insure that the new company would be a competitive factor in the market. 386 U.S. at 131, 136-140.

While reiterating the authority of the Attorney General to settle antitrust suits, the Court held that

[t]he Department of Justice . . . has *no authority* to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate . . . . Our direction was that the District Court provide for "divestiture without delay." That mandate in the context of the opinion plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market. 386 U.S. at 136. (emphasis added)

The fact that the Supreme Court had previously found an antitrust violation after a full trial, had ordered immediate divestiture of the El Paso acquisition, and the Court's view that the new decree submitted by the Department of Justice subverted its prior mandate, was therefore crucial to the grant of intervention in that case.<sup>28</sup> As in *Sam Fox*, the Court expressed the rule that intervention is appropriate in government antitrust proceedings only where the government has "no authority" to act in a particular manner, *e.g.*, corruptly or in disregard of a court order. After a searching examination of the facts submitted by all interested parties, the district court in this case appropriately applied this well-settled standard and found that the government had acted in good faith and within its discretion in negotiating and accepting the consent decree. (App. C, 30a, 41a)<sup>29</sup>

<sup>28</sup> This is particularly true when viewed in the context that it was the only method by which the Court could exercise control over its decree in circumstances where the Department of Justice had compromised its mandate.

<sup>29</sup> In addition, the court made the independent finding that the entry of the decree itself would benefit the public interest, as is required by the APPA. (App. C. 41a)

Further evidence that there is no need for additional guidance by the Supreme Court in this area is supplied by the consistent denial of intervention by the federal courts to parties who seek to complain about the exercise of discretion by the Attorney General but who cannot make a showing that he acted without authority or failed to perform his function.<sup>30</sup> The continued affirmance of this type of case by the Supreme Court should provide more than adequate advice concerning the appropriate standards for intervention in consent decree proceedings in government antitrust cases<sup>31</sup> and review here would therefore be unnecessary. Only two lower federal courts have issued reported decisions allowing private parties to intervene in antitrust consent decree proceedings and both are consistent with *Cascade*.<sup>32</sup>

<sup>30</sup> See, e.g., *United States v. International Telephone and Telegraph Corp.*, 349 F.Supp. 22 (D. Conn. 1972), *aff'd per curiam sub nom.*, *Nader v. United States*, 410 U.S. 919 (1973); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D. N.Y. 1970); *United States v. National Bank and Trust Co. of Central Pa.*, 319 F.Supp. 930 (E.D. Pa. 1970); *United States v. Automobile Mfrs' Ass'n, Inc.*, 307 F.Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.*, *City of New York v. United States*, 397 U.S. 248 (1970); *United States v. Western Electric Co., Inc.*, 1968 Trade Cases ¶ 72,415 (D. N.J.), *aff'd per curiam sub nom.*, *Clark Walter & Sons, Inc. v. United States*, 392 U.S. 659 (1968); *United States v. Blue Chip Stamp Co.*, 272 F.Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom.*, *Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968).

<sup>31</sup> A summary affirmance by the Supreme Court is entitled to precedential effect. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

<sup>32</sup> In *United States v. First National Bank and Trust Co. of Lexington, Ky.*, 280 F.Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom.*, *Central Bank & Trust Co. v. United States*, 391 U.S. 469 (1968) the court held that *Cascade* was "directly in point." 280 F.Supp. at 263. This was due to the government's "ninety

Finally, no conflict exists on this issue among the courts of appeals. In fact, the decision below by the Eighth Circuit is the first and only federal appellate court opinion to consider the propriety of intervention in a government antitrust case. As a result of the recent amendments to the Expediting Act embodied in Section 4 of the APPA, 15 U.S.C.A. § 29 (Supp. I, 1975) the appellate courts will play a greater role in the formulation of antitrust law and it is inadvisable and unnecessary for this Court to presently concern itself with this issue.

## II. The Courts Below Correctly Held that Petitioner Failed To Meet Its Burden To Justify Intervention or an Evidentiary Hearing

Relying on the well-established standard for intervention in government antitrust proceedings which was promulgated by the Supreme Court and applied by lower courts, the district court concluded that the evidence produced and proffered by petitioner failed

percent capitulation" in the relief requested in the consent decree in the face of a prior court order requiring divestiture. *Id.* In *United States v. Simmonds Precision Products, Inc.*, 319 F.Supp. 620 (S.D. N.Y. 1970) the district court issued a preliminary injunction in a merger case requiring preservation of the acquired company as a "going concern." The Government, however, entered into a consent decree which permitted "piecemeal" divestiture. These cases represent instances where the Government failed to comply with a prior court order as in *Cascade*. Moreover, in *Simmonds* intervention was not sought by a private treble damage claimant but by a union and its members who were interested in preserving their employment with the merged company. The Department of Justice in the negotiating of consent decrees is concerned with questions bearing on competition and does not usually focus on employment rights. It is therefore necessary for a court, through intervention, to consider factors necessary for the protection of such particularized interests of the parties who would ordinarily not be able to pursue their interests through a private treble damage action.

to support the bald assertion that the formulation of the consent decree was influenced by corruption. (App. C. 26a) Additionally, the court determined that the government personnel who had negotiated the decree acted "in good faith and without malfeasance." (App. C. 30a) The district court reached this conclusion after conducting extensive hearings on the propriety of the proposed decree, allowing the parties to comment upon and even question the government attorney in charge of the case about the decree, and carefully assessing this information together with petitioner's statement that it does not question the integrity of the government attorneys who negotiated and accepted the decree. (App. C. 23a) The court of appeals affirmed the determination by the district court that the evidence upon which petitioner relied was pertinent, if at all, only to the commencement of the case, and irrelevant to the negotiation or acceptance of the consent decree. (App. A. 9a)

The court of appeals did not, as petitioner suggests, require "a conclusive showing" that the Government acted corruptly with respect to the consent decree. (Pet. 34) To the contrary, the court merely affirmed the factual determination by the district court that petitioner had failed to raise even a presumption of a link between allegations of corruption in the inception of the case to bad faith in negotiating and accepting the decree. (App. A. 10a) <sup>33</sup>

<sup>33</sup> This is consistent with the holding of the court which reviewed the settlement of the government's antitrust case against ITT. As the court there noted:

*Amici* are more interested in conjecture, speculation and hypothesis about the possible existence of motive on the part of Mr. Mitchell, who was Attorney General when the settlement was effected; they purport, by a particularly clumsy form of logical legerdemain, to turn tentative guesses into established

Additionally, the court of appeals independently found that the facts surrounding the decree did not supply by implication the link of corruption in the inception of the case to the decree itself, as petitioner argued. First, the court noted that, contrary to the *Cascade* situation, the government in this case obtained essentially all of the relief through settlement which it sought in the complaint. Second, the failure to request the remedy of divestiture in the complaint was not peculiar or inadequate. Where agricultural cooperatives are involved in a monopolization case based upon improper practices, such as this one, divestiture is ordinarily not the appropriate remedy.<sup>34</sup> Further-

facts. It does not matter what the motives of then Attorney General Mitchell may have been. *No evidence has been offered to show that he exercised any influence on the settlement.* United States v. International Telephone and Telegraph Corp., 1974 Trade Cases ¶ 74,872, at p. 95,868 (D.Conn. 1974). (emphasis added)

<sup>34</sup> Petitioner cites United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 329 (1961), for the proposition that dissolution or divestiture "is traditionally and presumptively required in monopolization cases." (Pet. 15) The Court, however, stated that this was the remedy for violations "whose heart is intercorporate combination and control." *Id.* Principles developed in cases involving traditional corporate forms do not necessarily apply to agricultural cooperatives, where the production of the commodity sold is owned by each of a large number of farmers, rather than the cooperative itself. United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533, 562 (1939). The "[d]ifferences that permit substantive differentiations also permit differentiations of remedy." *Tigner v. Texas*, 310 U.S. 141, 149 (1940). Moreover, *du Pont* involved a litigated judgment, not a consent judgment, and it has been recognized that "where a consent decree, rather than a litigated judgment, is entered," the relief need not include divestiture. United States v. Blue Chip Stamp Co., 272 F.Supp. 432, 440 (C.D. Cal. 1967), *aff'd per curiam sub nom.*, Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968). Finally, the possible inability of petitioner to obtain divestiture in a private antitrust suit does not result from any action taken by the Government in this case.

more, the government established that dissolution would be contrary to the public interest. (App. A. 10a) Petitioner's argument that conclusive proof was established as a standard for intervention is therefore erroneous.

The weakness of petitioner's argument becomes apparent by its reliance upon *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), as establishing a different standard than that used for showing inadequate representation in a government antitrust case. *Trbovich* involved a motion to intervene by a union member in litigation brought by the Secretary of Labor to set aside an election of union officers under Title IV of the Labor-Management Reporting and Disclosure Act. Under that legislation a union member was not granted the right to bring an independent private court action to enforce its provisions. Pursuant to the statutory scheme, the Secretary of Labor has the obligation to protect both the public interest in free and democratic union elections and the individual union member's rights against his union and he "in effect becomes the union member's lawyer" for purposes of enforcing . . . [the union members'] rights." *Id.* at 539. Therefore, "[e]ven if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.'" *Id.*

It is not surprising that the Court has possibly recognized a lesser burden of showing inadequate representation in the *Trbovich* situation than in a government antitrust case. Under the antitrust laws, a private individual has a right to bring an independent antitrust suit for treble damages which is not limited

in any respect by the government's action.<sup>35</sup> Moreover, the Government brings its cases solely on behalf of the general public, while private parties are able to pursue their own personal interests through treble damage actions. Therefore, unlike the situation which confronted the Court in *Trbovich*, the Government does not act as the lawyer for private parties.<sup>36</sup> The "private and public actions were designed to be cumulative, not mutually exclusive . . . . 'Different policy considerations govern each of these.'" *United States v. Borden Co.*, 347 U.S. 514, 518-519 (1954).

Although the lower courts did not require a conclusive showing, they did recognize that merely an unsupported "claim" of inadequate representation is insufficient to justify intervention by a private treble damage claimant in a government antitrust proceeding.<sup>37</sup> This is based upon the principle that where the government is prosecuting or defending a legal matter

<sup>35</sup> Section 4 of the Sherman Act, 15 U.S.C. § 15 (1970); *Sam Fox Publishing Co., Inc. v. United States*, 366 U.S. 683, 690 (1961); *United States v. City of Jackson, Mississippi*, 519 F.2d 1147, 1151 (5th Cir. 1975); *Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

<sup>36</sup> This interpretation of *Trbovich* has been adopted by the federal courts. *See, e.g.*, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 845 n.21 (5th Cir. 1975), *cert. denied*, — U.S. —, 96 S.Ct. 1684 (4/19/76).

<sup>37</sup> Indeed, the district court found that petitioner failed to adequately inform the court whether it even had a "claim" that the consent decree negotiations had been tainted. (App. C. 30a) Moreover, since petitioner itself states that "the mere claim of possible wrongdoing should not be sufficient to trigger a hearing requirement" (Pet. 38), *a fortiori* merely a "claim" of inadequate representation such as is made by petitioner is insufficient to justify intervention.

there is a "presumption" of adequate representation of the public interest, which does not exist in a purely private controversy.<sup>38</sup> The courts have, therefore, held that to overcome this presumption "to justify intervention [in a government antitrust proceeding], the allegedly inadequate representation by the Justice Department must be 'shown clearly.' " *United States v. International Telephone and Telegraph Corp.*, 349 F. Supp. 22, 27, 27 n.4 (D. Conn. 1972), *aff'd per curiam sub nom., Nader v. United States*, 410 U.S. 919 (1973); *United States v. CIBA Corp.*, 50 F.R.D. 507, 513 (S.D.N.Y. 1970).<sup>39</sup>

The district court and court of appeals both independently determined that a clear or strong factual showing of inadequate representation had not been made by petitioner and intervention was accordingly denied. Furthermore, the district court found that it was neither necessary nor appropriate to hear the live testimony of any particular witness which any party offered to call in an evidentiary hearing. (App. C.

<sup>38</sup> See 7 A.C. Wright & A. Miller, *Federal Practice and Procedure* § 1909, at 528 (1972). See also *United States v. International Business Machines Corp.*, 62 F.R.D. 530, 532 n.1 (S.D. N.Y. 1974). The other cases relied upon by the petitioner for its argument that only a minimal burden of inadequate representation need be shown are also irrelevant to the particular issue which confronted the courts below. Such cases dealt with intervention in cases where the representative was a private party and for the reasons stated herein are clearly distinguishable from intervention in a government antitrust proceeding. (Pet. 26),

<sup>39</sup> Professors Wright and Miller have likewise recognized that, in these circumstances, inadequate representation must be demonstrated by a "concrete," "very strong" or "very compelling" showing. 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1909, at 528, 529, 531 (1972).

19a) This was to a large extent based on the fact that the data proffered by NFO to support its request for a hearing "was either uncontroverted or clearly irrelevant and immaterial to any issue before the Court."<sup>40</sup> This Court does "not grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), nor is jurisdiction "conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Therefore, the petition should be denied.

### III. Recent Legislation Has Diminished the Importance of the Issue Here Involved

On December 21, 1974, the Antitrust Procedures and Penalties Act was signed by the President and enacted into law. Section 2 of the new Act relating to consent decrees negotiated with the government was passed to assure the "integrity of and public confidence in procedures relating to settlements via consent decree procedures" and was designed to "substitute 'sunlight' for 'twilight'" in the Justice Department's decision to enter into a proposal for a consent decree. H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. (1974), at 6. As a result of this new legislation, interested persons, although not formally made parties to the proceeding, are given the opportunity to intensively examine the legal and factual reasoning behind the consent decree proposal and thereafter respond affirmatively or negatively to such proposal. Since these new procedures will serve to heighten public awareness of and partici-

<sup>40</sup> See also App. C. 26a, 30a, 36a. This finding was affirmed by the court of appeals. (App. A. 11a)

pation in the government's consent decree proceedings, there is no need for the Court to expand or even re-examine the heretofore well-settled standards for allowing intervention in such situations.

A brief summary of the relevant provisions of the APPA illustrates the increased degree of participation. Initially, at the time of filing the proposal, the United States must file with the court, publish in the Federal Register, and supply to any person who requests it, a "competitive impact statement." This statement includes a description of the acts and practices complained of, explanation of the proposed relief and its anticipated effects on competition, remedies available to other persons including procedures for modification of the judgment, and an evaluation of alternatives considered but rejected. Section 2(b).<sup>41</sup> Interested persons are then given an opportunity to comment upon the proposal for a consent judgment and the supporting materials and the United States must then publicly respond to such comments. Section 2(d). On the basis of this material, as well as full or limited participation in the proceedings by interested persons if desired by the court, the district court judge is to determine whether the entry of the decree is in the public interest.

Given the availability of these procedures by which any member of the public can be informed of and participate in proceedings leading to the approval or disapproval of a proposed consent judgment, the importance of propounding any further standards for

<sup>41</sup> A summary of this material as well as a list of determinative documentary material must also be published for a specified period of time in general news publications. Section 2(c).

intervention in cases brought by the United States has been vastly diminished. Whereas previously the sole legislatively recognized avenue for public participation was through intervention,<sup>42</sup> Congress has now formally granted parties additional means by which they can make a significant contribution to the consideration of a consent decree by the court but yet not disrupt or confuse the judicial proceedings, *e.g.*, comments to competitive impact statements and to government responses to third-party inquiries. Thus, under the APPA, without intervention, an interested person is still guaranteed a considerable ability to bring before the court reasons and information relating to whether the proposed decree should be approved.

Moreover, the APPA has diminished the importance of the questions presented in the petition by Congress' express approval of past judicial opinions relating to intervention in government antitrust consent decree proceedings. All of the relevant precedent had been established at the time of the enactment of this legislation and if Congress thought that expansion or clarification of the right to intervene was needed in these cases, it had a perfect opportunity to do so. Instead, Senator Tunney, who was a major proponent of the bill, stated that

[p]rovision 2(f)(3), which provides that a court may authorize participation in its proceedings upon a proposed consent decree by interested persons or agencies, is not intended to broaden the

<sup>42</sup> Courts have also received input in evaluating proposed consent decrees from third parties participating in an *amicus curiae* status. See, *e.g.*, *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970).

existing right of intervention. 119 Cong. Rec. S13928 (daily ed., 7/18/73).<sup>43</sup>

Therefore, it is clear that Congress was well aware of the state of the law in these circumstances and specifically declined to alter it.

The petition is replete with attempts to expand intervention by reliance upon the APPA. (Pet. 34, 38) These arguments were made to Congress when it was considering the legislation and were rejected.<sup>44</sup> In this context, where there is no conflict in the courts as to the standards for intervention and where Congress has definitively established that these standards are appropriate and are to remain the same, the petition raises no issue of public importance but rather seeks a rehearing of solely a private controversy. In the words of Mr. Chief Justice Taft:

[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a

<sup>43</sup> Senator Tunney also stated that the APPA, although insuring meaningful comment, would not have altered the outcome of *United States v. International Telephone and Telegraph Corp.*, 349 F.Supp 22 (D. Conn. 1972), *aff'd per curiam sub nom.*, *Nader v. United States* 410 U.S. 919 (1973) and *United States v. International Telephone and Telegraph Corp.*, 1974 Trade Cases ¶ 74,872 (D. Conn. 1974). See Hearings Before Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., 1st Sess. (1973), at 2. Cf. H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. (1974), at 9.

<sup>44</sup> See, e.g., remarks of Worth Rowley, Esquire, Hearings Before Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., 1st Sess. (1973), at 141: "[The statute] does and should . . . increase the rights of intervenors."

real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)

The petition for writ of certiorari should accordingly be denied.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIDNEY HARRIS

FRED KLEIN

ARENT, FOX, KINTNER, PLOTKIN  
& KAHN

1815 H Street, N.W.

Washington, D. C. 20006

(202) 857-6000

*Attorneys for Respondent,  
Associated Milk Producers, Inc.*

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